EX PARTE OR LATE FILED

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CINERGY. COMMUNICATIONS

July 18, 2005

**EX PARTE**

ORIGINAL

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Bell South Emergency Petition for Declaratory Ruling and Preemption of State Action*, WC Docket No. 04-245;

*Unbundled Access to Networks Elements*, WC Docket No. 04-313;

*Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338

Dear Ms. Dortch,

Cinergy Communications Company ("Cinergy") submits this ex parte in response to an ex parte letter submitted on June 15, 2005 by BellSouth Corporation ("BellSouth").

In its ex parte letter, BellSouth urged the Commission to find that: "(i) state public service commissions have no jurisdiction to establish rates for network elements that are not required to be unbundled pursuant to Section 251 of the Telecommunications Act of 1996 ("1996 Act"); and (ii) commercial agreements [meaning voluntary agreements between ILECs and CLECs that are not the result of a request for interconnection, network elements, or any other service under 47 U.S.C. § 251] need not be filed with, or approved by, state public service commissions under Sections 251 and 252 of the 1996 Act."[1] Also in that letter, BellSouth set forth a number of arguments supporting its position, citing provisions of the 1996 Act and Commission precedent. Cinergy disagrees with several of the statutory and precedential interpretations addressed by BellSouth in that letter for the reasons set forth herein.

[1] Ex Parte Letter from Bennett L. Ross, General Counsel-D.C. for BellSouth D.C., Inc., to Marlene Dortch, FCC (June 15, 2005).

At the crux of this debate are two Sections of the 1996 Act: Section 252 and Section 271. Section 252 of the 1996 Act grants state public commissions the authority to establish cost-based rates for interconnection between ILECs (including BellSouth) and CLECs and also grants them the authority to examine, review, arbitrate, and approve interconnection agreements ("ICAs") between the two groups as well.[2] In its ex parte filing, BellSouth claims that the language of Section 252(a) explains that the relevant state commission should only be involved in the implementation of ICAs made pursuant to Section 251. However, the 1996 Act and Commission precedent make plain that Section 271 requirements,[3] including loops, transport, and switching, also must be implemented using ICAs under Section 252.

Section 271(c)(2)(A) of the 1996 Act provides that a BOC meets the necessary requirements of Section 271 if it provides access and interconnection pursuant to agreements or, if it has not received an interconnection request, pursuant to a statement of general terms and conditions.[4] Section 271(c)(1)(A) states that in order for one of the above-mentioned agreements to meet the requirements of Section 271, the agreement must be a "binding agreement[] that [has] been ***approved under Section 252***."[5]

In addition to meeting one of the above standards, a BOC must also meet obligations found in Section 271(c)(2)(B)'s competitive checklist.[6] The Commission has stated, "BOCs have an independent obligation, under Section 271(c)(2)(B), to provide access to certain network elements that are no longer subject to unbundling under Section 251, and to do so at just and reasonable rates."[7] In addition, the Commission has made clear that this is a *continuing* obligation to provide interconnection to 271-specific checklist items, "***regardless of any unbundling analysis under Section 251***."[8] "[E]ven in the absence of impairment, BOCs must unbundled local loops, local transport, local switching, and call-related databases [elements four, five, six, and ten of the competitive checklist found in Section 271]."[9]

This obligation must be monitored by state public service commissions, as the Commission has found that a BOC "must" satisfy these checklist obligations "pursuant to state-approved interconnection agreements that set forth prices...for each checklist

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[2] 47 U.S.C. § 252.
[3] The requirements of this Section apply only to Bell Operating Companies ("BOCs").
[4] 47 U.S.C. § 271(c)(2)(A).
[5] 47 U.S.C. § 271(c)(1)(A) (emphasis added).
[6] 47 U.S.C. § 271(c)(2)(B).
[7] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 652 (2003) ("*TRO*").
[8] *TRO*, ¶ 653 (emphasis added).
[9] United States Telecom Ass'n v. FCC, 359 F.3d 554, 588 (D.C. Cir. 2004) ("*USTA II*"). The District of Colombia Ciruit also found that "[t]he FCC reasonably concluded that checklist items four, five, six and ten imposed unbundling requirements for those elements independent of the unbundling requirements imposed by [Sections] 251-52.").

item."[10] These state-approved ICAs are the "binding agreements that have been ***approved under Section 252***" referred to in Section 271(c)(1)(A).[11] Therefore, a state commission's authority to implement Section 271 checklist obligations is not only implied in such commission's general authority over ICAs under Section 252 but is explicitly invoked in Section 271 itself. Without an interconnection agreement "approved under Section 252," BellSouth is clearly out of compliance with its Section 271 obligations, and the only manner in which BellSouth can comply is by gaining approval of a 271-related ICA involving the checklist items from a state public service commission.

In addition, the Senate report regarding the Section 271 competitive checklist states that the checklist was created to "set forth what must, at a minimum, be provided by a Bell operating company in ***any interconnection agreement*** approved under Section 251 [and, therefore, 252] to which that company is a party."[12] Clearly the Senate intended for the two sections to remain intertwined as well.

The FCC also has recognized that interconnection agreements are the only feasible way to implement the *TRO* and found that when an agreement cannot be reached between carriers, the carriers should request arbitration by the state commission, who would then implement the *TRO* under the Section 252 process.[13] Furthermore, the FCC has dismissed an application filed under Section 271 after finding that the BOC failed to comply with the checklist if the BOC relied on an agreement that had not been approved by the relevant state commission.[14] The FCC has determined that a BOC satisfies its Section 271 requirements if a "concrete and specific legal obligation to furnish the item upon request pursuant to state-approved interconnection agreements [sets] forth prices and other terms and conditions."[15]

As of December 2003, *all* of the Section 271 applications granted by the Commission included "an enforcement plan administered by the relevant state commission to protect against backsliding after BOC entry into the long distance market."[16] The Commission found that "these mechanisms can serve as critical complements to the Commission's authority to preserve checklist compliance pursuant to Section 271(d)(6)."[17] This finding clearly shows Commission acceptance of a state public service commission's role in the Section 271 process.

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[10] *See* Application by Verizon New England Inc. et al. for Authorization to Provide In-Region, InterLATA Services in Vermont, CC Docket No. 02-7, Memorandum Opinion and Order, 17 FCC Rcd 7625, Appendix D ¶ 5 ("*Vermont 271 Order*").

[11] 47 U.S.C. § 271(c)(1)(A) (emphasis added).

[12] S. Rep. 104-23, 104th Cong., 1st Sess., at 43 (March 30, 1995).

[13] *TRO*, ¶¶ 701, 703-704.

[14] *See Application by Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-1, Order, 12 FCC Rcd 3309, ¶ 22 (1997).

[15] *Vermont 271 Order*, Appendix D ¶ 5.

[16] Application by Qwest Communications International Inc. for Authorization to Provide In-Region, InterLATA Services in Arizona, WC Docket No. 03-194, Memorandum Opinion and Order, FCC 03-309, at n. 196.

[17] *Id.*

Nevertheless, BellSouth states that only the Commission can enforce compliance with Section 271, citing language in Section 271(d)(6). Therefore, BellSouth claims, the Commission preempts any action of a state public service commission regarding Section 271. Cinergy also recognizes the Commission's authority to enforce Section 271; however, deciding which entity has authority to establish Section 271 rates and terms is a separate matter.[18] BellSouth's preemption argument equates the Commission's role in approving Section 271 applications and enforcing the requirements of 271 with the states' role in approving and arbitrating 252 agreements. The Commission can clearly enforce the requirements of Section 271, but the language of Section 271 does not preclude or preempt state commissions from establishing rates and terms when acting as an arbitrator under Section 252. Moreover, Cinergy is not even trying to make a state *enforce* Section 271; Cinergy only wants a state public service commission to perform its Congressionally mandated duties under 252.

In further support of Cinergy's position, in June 2005, the Illinois Commerce Commission ("ICC") issued an Order in which the ICC concluded that CLECs are *not* attempting to "enforce" Section 271 rights when they seek to include Section 271 elements in Section 252 ICAs. Instead the ICC found that CLECs are asking to enforce rights under ICAs, over which state commissions retain authority.[19] The ICC concluded that, even where § 271 checklist items are not included in current agreements, CLECs have the right to "request negotiations to incorporate 271 rights in their ICAs."[20] The Illinois Commission clearly saw the need to incorporate terms related to § 271 obligations into § 252 ICAs – just as the Act itself contemplates. Also in June, the Arbitrator in a Missouri arbitration also held that Section 271 checklist items must be included in ICAs.[21] The Missouri Public Service Commission agreed with this decision in a July 11, 2005, Arbitration Order.[22] Furthermore, in April 2005, an Oklahoma Arbitrator's Report recommended that § 271 checklist items be included in § 252 interconnection agreements. The Arbitrator also recommended that § 271 checklist items

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[18] *Cbeyond Communications et al. v. Illinois Bell Telephone Company*, Case No. 05-0154, ALJ Decision (Ill. Commerce Comm., May 9, 2005), at 23.

[19] *Cbeyond Communications, LLP, et al. v. SBC Illinois*, Illinois Commerce Commission, Docket No. 05-0154, Order, at 24 (June 2, 2005) ("ICC Decision").

[20] *Id.* at 27.

[21] Missouri Public Service Commission, Case No. TO-2005-0336, *Southwestern Bell Telephone, L.P. d/b/a SBC Missouri's Petition for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Missouri 271 Agreement ("M2A")*, Final Arbitrator's Report, Section III at 5-6 (June 21, 2005). The Missouri Arbitrator's holding was straightforward: ICAs "shall include both § 251(c)(3) and § 271 network elements. To the extent SBC Missouri remains obligated to offer pursuant to § 251(c)(3), then prices must be TELRIC. To the exent it must offer pursuant to § 271, then prices must be just and reasonable." *Id.* at 6.

[22] *See* Missouri Public Service Commission, Case No. TO-2005-0336, *Southwestern Bell Telephone, L.P., d/b/a SBC Missouri's Petition for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Missouri 271 Agreement ("M2A")*, Arbitration Order, Section (C)(4)(B) at 28-30 (July 11, 2005).

be subject to commingling requirements under the *TRO*.[23] This report has not yet been approved by the Oklahoma Corporation Commission; a decision on the parties' exceptions to the report is expected later this month.

Despite these recent decisions, BellSouth maintains its position. In addition to its reliance on the *TRO*, BellSouth cites two other Commission precedents of questionable relevance. In its ex parte letter, BellSouth cites the *Qwest ICA Order*[24] for the proposition that only agreements relating to ongoing Section 251 obligations must be filed with state commissions. Cinergy agrees with the Commission's finding in that order that not *all* agreements need to be filed with state commissions, but BellSouth ignores an important part of the decision: the Commission determined that "state commissions are well positioned to decide on a case-by-case basis whether a particular agreement is required to be filed as an 'interconnection agreement.'"[25] Therefore, a state could deem an agreement relating to Section 271 interconnection and access requirements to be an "interconnection agreement" under 252 and could then require the agreement to be filed with the state public service commission.

BellSouth's reliance on *U.S. West Petitions to Consolidate*[26] is likewise misplaced. This particular memorandum opinion and order only discusses and rules on jurisdictional issues regarding LATA-boundary administration and adjustment as they related to Section 271, not the Commission's "exclusive authority" over "the Section 271 process" in general, as BellSouth implies.[27] Furthermore, in this decision, the Commission notes that state commissions play a "significant role" in evaluating BOC compliance with 271, despite its ruling that LATA boundary modification is within the province of the Commission.[28]

Finally, Cinergy seeks to address BellSouth's argument against state commissions' authority to establish rates for Section 271 elements. Concededly, in the *TRO*, the FCC held that Section 271 checklist network elements that BOCs no longer are required to provide under Section 251 do not have to be priced at TELRIC rates. The FCC did ***not***, however, provide for automatic or complete deregulation of rates for Section 271 checklist items. Rather, the FCC found that the Section 271 checklist items are to be priced at "just and reasonable" rates.[29] TELRIC rates for Section 251 network

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[23] Oklahoma Corporation Commission, Cause No. PUD 200400497, *Petition of CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L.P. d/b/a SBC Oklahoma Under Section 252(b)(1) of the Telecommunications Act of 1996*, Written Report of the Arbitrator, at 199 (April 7, 2005).

[24] *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Agreements underSection 252(a)(1)*, Memorandum Opinion and Order, 17 FCC Rcd 19337 ("*Qwest ICA Order*").

[25] *Id.* at ¶ 10.

[26] *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding U.S. West Petitions to Consolidate LATAs in Minnesota and Arizona*, 14 FCC Rcd 14392 (1999) ("*US West Petitions to Consolidate*").

[27] Ex Parte Letter from Bennett L. Ross, General Counsel-D.C. for BellSouth D.C., Inc., to Marlene Dortch, FCC (June 15, 2005) (citing *US West Petitions to Consolidate* at 14401-02 ¶ 18).

[28] *Id.* at 14399 ¶ 15.

[29] *TRO* ¶ 663: "Thus, the pricing of checklist network elements that do not satisfy the unbundling standards in Section 251(d)(2) are reviewed utilizing the basic just, reasonable, and nondiscriminatory rate standard

elements have been determined in Section 252 proceedings since 1996, and those rates have been incorporated in state commission-approved ICAs. So should be the case for the future "just and reasonable rates" for Section 271 network elements; this is the only way to continue to meet the goal of competition inherent in the 1996 Act. Moreover, because competitive checklist items are the subject of Section 252 ICAs, the rate-setting authority given to state commissions in Section 252(d) must also necessarily apply regarding all available Section 271 elements. To find otherwise would permit the incumbent monopolist to determine for itself what rates are "just and reasonable."

Clearly, the 1996 Act recognized that a monopoly is incapable of setting a "just and reasonable" rate and that a third party must necessarily assist in determining this rate. Moreover, in *Verizon Communications, Inc. v. FCC*,[30] the United States Supreme Court recognized that ILECs may overstate embedded costs of capital and stated that BOCs "had accumulated a vast library of accounting books that belonged alongside dime-store novels and other works of fiction."[31] Therefore, BOCs simply cannot be trusted to determine a "just and reasonable" rate. In addition, the Commission is simply not equipped to determine a "just and reasonable" rate in each and every market in the country. State public service commissions have a great deal of experience and expertise in the area of ratesetting; the Commission does not have this type of experience.[32] Therefore, it is reasonable that state public service commissions should be entrusted with the task of 271 ratesetting.

In sum, BellSouth's arguments seek to read out of Section 271 the explicit references back to § 252. The statutory language, however, contemplates a linkage between agreements over which state commissions have authority under Section 252 and the terms and conditions in Section 271. This linkage not only comports with the way the federal Act is structured, but is also consistent with the way the Commission has treated § 271 checklist items. The Senate committee also required Section 271 checklist items to be incorporated in Section 252 agreements. Like the rates, terms, and conditions of Section 251 UNEs, the rates, terms and conditions of Section 271 checklist items should be established using the Section 252 negotiation and arbitration process. The Commission should not effectively force CLECs to waive their right of access under Section 271. CLECs should be able to negotiate for access for the above-discussed checklist elements, using the avenue provided by Congress: a state-approved Section 252 ICA.

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of Sections 201 and 202 that is fundamental to common carrier regulation that has been historically applied under most federal and state statutes, including (for interstate services) the Communications Act." The "just and reasonable" rate standard set forth in the *TRO* was upheld by the *USTA II* court and provides the governing standard for establishing rates for § 271 checklist items.

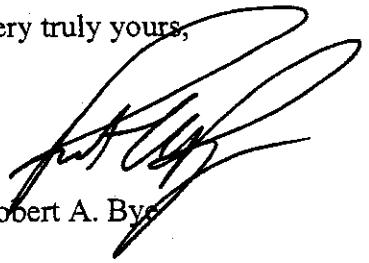
[30] *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002).

[31] *Id.* at 518.

[32] *See id.* at 476. The Commission chose which methodologies would be used by the state commissions when setting rates; the state commissions were the parties involved in *setting* the rates for ILECs. *Id.*

Please include this letter in the record in the above-listed proceedings. Thank for your consideration and your attention to this matter.

Very truly yours,



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